

***United States Court of Appeals
for the Second Circuit***



**INTERVENOR'S
BRIEF**

77-4057

Brief For Intervenor Securities Industry
Automation Corporation

Intervenor in No. 77-4057

In the
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 77-4057, 77-4067, 77-4068, 77-4073, 77-4074, 77-4075

AMERICAN TELEPHONE AND TELEGRAPH COMPANY
INTERNATIONAL BUSINESS MACHINES CORPORATION
SECURITIES INDUSTRY AUTOMATION CORPORATION
UNITED SYSTEM SERVICE, INC.
AERONAUTICAL RADIO, INC.
AIR TRANSPORT ASSOCIATION OF AMERICA
TELENET COMMUNICATIONS CORPORATION,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents,

AMERICAN TRUCKING ASSOCIATIONS, INC., et al.,

Intervenors.

On Petitions for Review of Orders
of the Federal Communications Commission

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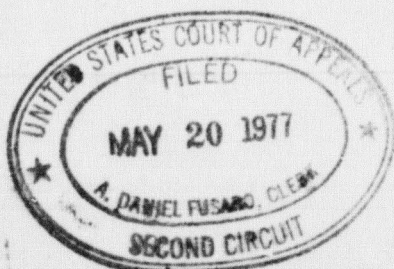




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No. 77-4057
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AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Petitioner,

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FEDERAL COMMUNICATIONS COMMISSION
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Respondents,

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Intervenors.

On Petitions for Review of Orders of
the Federal Communications Commission

BRIEF FOR INTERVENOR SECURITIES INDUSTRY
AUTOMATION CORPORATION

QUESTIONS PRESENTED

A. Whether the Commission properly determined to follow its consistent interpretation of the Communications Act that nonprofit cost sharing of communications is not common carriage subject to direct rate and entry regulation under Title II of the Act.

B. Whether the Commission, having found the shared use restrictions of American Telephone and Telegraph Company to be unlawful, erred by prescribing unlimited and unrestricted shared use, rather than tariffs similar to the "authorized use"

private line tariff provisions of the specialized common carriers and Western Union which permit unlimited shared use of private line communications service without discrimination among entities in the "same business or industry" or the "same line of business" and which have been shown to be consistent with both bulk rates and user requirements.

PRELIMINARY STATEMENT

Petitioners United Systems Service, Inc. and Telenet Communications Corporation challenge the Federal Communications Commission's (the "Commission's") consistent interpretation of the Communications Act that nonprofit shared communications systems are not subject to direct economic regulation as common carriers for hire. This position, designed to protect existing common carriers, would, if adopted, significantly lessen the ability of users to structure their own systems cooperatively to meet their requirements and would unnecessarily and unwisely increase federal regulation, with no meaningful public benefit. Petitioner International Business Machines, in contrast, presents a compelling case that for-profit resellers should not be regulated. But, clearly, the Commission's decision that nonprofit shared communications should continue to be unregulated should be affirmed.

Petitioner American Telephone and Telegraph Company (AT&T) challenges the entire proceeding below, both substantively and procedurally, which led the Commission to prescribe for all carriers unlimited resale and shared use of private line service. AT&T argues that the record will not support such a prescription and that the Commission ignored the impact of such action on its bulk rate schedule. But AT&T overlooks the alternative of "authorized use" provisions similar to the tariffs of Western Union and the new specialized common carriers¹ which, in effect, permit unlimited shared use of private lines by users in the same line of business through a not-for-profit industry intermediary, such as the Securities Industry Automation Corporation (SIAC). As such, these tariff provisions would satisfy all of the user requirements for shared use of private line service shown on the record and would be consistent with bulk rates, because these provisions are now offered in conjunction with bulk rates. Regrettably, the Commission gave scant attention to this alternative below.

The record amply demonstrates the suitability of a prescription of shared use restricted to participants in a common line of business, or otherwise sharing a community of interest, and this Court should direct the Commission to enter such a prescription.

1 Hereinafter, the term "specialized common carrier" includes both terrestrial specialized carriers and domestic satellite carriers.

COUNTERSTATEMENT OF THE CASE

A. The Commission's Proceedings

²
The Orders of the Commission under review in the case at bar are the result of a proceeding initiated in 1974.³ In its Notice of Inquiry and Proposed Rulemaking, the Commission requested the parties in the proceeding to address a number of issues relating to the policies of communications common carriers toward the resale and shared use of private line service.

To assist in conducting its inquiry and formulating its final Order, the Commission called for three rounds of comments by the parties. The Commission indicated it would then issue a "First Report and Order," designating matters requiring further consideration.⁴ The Commission abandoned this procedure, however, and simply issued a final Report and Order on the basis of the three rounds of written

2 Report and Order: Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, 60 F.C.C.2d 261 (1976), J.A. at 28 et seq. (hereinafter referred to as "Report and Order"); Memorandum Opinion and Order, F.C.C. 77-34 (released Jan. 12, 1977), J.A. at 152 et seq. (hereinafter referred to as "Reconsideration Order").

References to record material in the Joint Appendix are designated as "J.A. at ____."

3 Notice of Inquiry and Proposed Rulemaking, 47 F.C.C. 2d 644 (1974), J.A. at 12 et seq.

4 Id., 47 F.C.C.2d at 659, J.A. at 27.

5
comments. Thus, the Commission's decision was rendered solely on the basis of "notice and comment" procedures without oral hearings. Nor was the decision subject to comment while in tentative form.

B. The Commission's Order and Its Effect

The Commission in its Report and Order examined at some length the restrictions and limitations on private line resale and shared use in AT&T's tariff provisions and found these provisions to be unjust and unreasonable and unlawfully discriminatory. The Commission, however, then proceeded to extend this finding to the tariff provisions of the specialized common carriers (SCC's), Western Union and the international record carriers.

The Commission extended its findings and declared unlawful the tariff provisions of the carriers other than AT&T without meaningful consideration of their particular provisions, which differ significantly from those of AT&T. The Commission has since recognized, at least to a limited extent, that such an approach is inappropriate; upon re-consideration, the Commission withdrew the applicability of the Order to the international record carriers.⁶

5 See Report and Order, supra note 2, 60 F.C.C.2d at 262, J.A. at 30.

6 Reconsideration Order, supra note 2, ¶ 10, J.A. at 159.

Having found AT&T's restrictions on resale and shared use to be unlawful, the Commission proscribed any restrictions on such activities, without seriously considering the lawfulness of any intermediate level of restrictions.⁷ The Commission adopted this policy despite the fact that no private line user had sought the total abolition of all restrictions.

Indeed, the probable reason that users did not seek completely unrestricted and unlimited sharing⁸ is that the adoption of such a policy by the Commission will ultimately adversely affect the service available to all users. The prohibition of all restrictions and limitations on resale and sharing will force carriers to discontinue bulk rate offerings in an effort to maintain any semblance of order in their rate structures. This Court has previously

7 See Report and Order, supra note 2, 60 F.C.C.2d at 283, J.A. at 58. In its discussions of the possible regulation of sharing and the "single customer" provisions, the Commission noted and summarily rejected without meaningful analysis the possibility of restricting unlimited sharing to groups of entities within the same line of business. See 60 F.C.C.2d at 319-20, 335-36, J.A. at 106, 139. This consideration was clearly inadequate. See note 51, infra.

8 As used in this brief, "unrestricted" sharing refers to the number and type of parties which may enter into a sharing arrangement. "Unlimited" sharing refers to the range of communications services available through the sharing arrangement.

recognized the incompatibility of bulk rates and unrestricted and unlimited sharing. American Telephone & Telegraph Co. v. FCC, 449 F.2d 439, 451-53 (2d Cir. 1971). Indeed, AT&T and MCI have already moved to eliminate their bulk rate offerings and other carriers are likely to do the same if the Commission's Order in the proceeding under review is upheld.⁹

The Commission also considered the proper regulatory scheme for the new shared use and resold private line services. The Commission determined that for-profit resale would be subject to regulatory supervision under Title II of the Communications Act, but that barriers to entry would be diminished. Further, the Commission found nonprofit shared use not to be common carriage, which has been its consistent interpretation of the Communications Act since its decision in Aeronautical Radio, Inc. v. American Telephone & Telegraph Co., 4 F.C.C. 155 (1937).

C. The Nature of SIAC and Its Operations

SIAC is a wholly owned subsidiary of the New York Stock Exchange and the American Stock Exchange. SIAC was formed in 1972 as a vehicle by which the exchanges, through SIAC's data

9 AT&T Transmittal No. 12714 to the Federal Communications Commission (filed March 23, 1977, to be effective June 8, 1977); MCI Telecommunications Corp. Transmittal No. 67 to the Federal Communications Commission (filed April 8, 1977, to be effective July 7, 1977).

processing and communications services, could carry out their obligations, statutory and otherwise, to improve the efficiency and effectiveness of the operations of the exchanges, their members, and other segments of the securities industry.¹⁰

SIAC operates the Securities Telecommunications Organization (SECTOR), a not-for-profit industry service organization whose communications network currently consists of voice and data circuits supplied by a broad spectrum of communications carriers, including American Satellite Corp., CPI Microwave, Inc., MCI Communications Corp., RCA American Communications, Southern Pacific Communications Co., United States Transmission Systems, and Western Union. The network comprises some 3,200 circuits, totalling in excess of 1.5 million miles, and serves over seventy principal cities throughout the United States.¹¹

SECTOR's services are available on a not-for-profit basis to all stock exchanges and their instrumentalities (clearing corporations and securities depositories), the National Association of Securities Dealers, the Chicago Board Options Exchange, and all firms which are members of the foregoing organizations. The eligible users of SECTOR's communications services thus include virtually

10 Comments of SIAC in F.C.C. Docket No. 20097 at 1, J.A. at 702 (hereinafter referred to as "SIAC Comments").

11 See SIAC Comments at 13, J.A. at 714, for the scope of SIAC operations as of October, 1974. The figures in the text reflect the scope of SIAC's operations in April 1977.

all elements of the securities industry.¹²

The fundamental element of the securities markets has always been communications -- communication of offers, quotations, last sale prices, confirmations, and relevant market information. Indeed, the securities markets are in substance a communications system by which buyers and sellers of securities are able to "meet," negotiate, and execute transactions through their respective brokers.

Although communications have always been the essence of the securities market, the need for efficient communications is more crucial today than ever before. Congressional and Securities and Exchange Commission (SEC) directives relating to such diverse issues as negotiated commissions, the consolidated trade system, consolidated quotations, and the direction of the national market system, have all placed and will continue to place a greater emphasis on the use of communications in the securities industry.¹³

In addition to its central role in the negotiation and consummation of actual sales transactions, a sophisticated and efficient communications system is also a central

12 SIAC Comments at 13, J.A. at 714.

13 See, e.g., Securities Exchange Act of 1934, as amended by the Securities Act Amendments of 1975 (Pub. L. No. 94-29), §§ 11A(a)(1)(D), 15 & 17A, 15 U.S.C. §§ 78k-1(a)(1)(D), 78o & 78q-1 (Supp. V 1975). See also H.R. Conf. Rep. No. 94-229, 94th Cong., 1st Sess., reprinted in [1975] U.S. Code Cong. & Ad. News 321.

requirement of orderly recordkeeping concerning such transactions. This function of communications in the securities markets was particularly highlighted in the late-1960's when drastic increases in exchange volumes created tremendous
14
"back office" problems.

The Securities and Exchange Commission as early as June 1968 clearly indicated that the self-regulatory organizations (that is, the stock exchanges and the National Association of Securities Dealers) have the primary responsibility to ensure that brokerage firms' books and records are maintained currently and accurately and that the firms are able to meet their obligations to
15
settle transactions promptly.

As recently as January 1977, the SEC again emphasized the role of communications when, in approving the registration of the National Securities Clearing Corporation, the SEC stressed the need to maintain interfaces (communications) with the regional stock exchanges' clearing
16
entities.

14 SIAC Comments at 6-11, J.A. at 707-12.

15 SEC, Statement on Paper Work Backlogs, SEC Securities Exchange Act Release No. 8335 (June 17, 1968), [1967-1969 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 77,566.

16 See SEC Securities Exchange Act Release No. 13163 (Jan. 13, 1977), at 117.

SIAC was established to meet the self-regulatory organizations' responsibilities to provide and maintain effective processing and communications systems, thereby satisfying the mandate of the Securities and Exchange Commission, as well as other technical and business requirements.¹⁷

SIAC does not challenge the Commission's holding that AT&T's tariff provisions unlawfully restrict sharing or resale of private line services. SIAC does, however, question the Commission's holding that the SCC and Western Union tariff provisions contain unlawful restrictions on sharing.

SIAC's purpose in making this presentation to the Court is to point out that, should the Court conclude that the Commission correctly found AT&T's restrictions on sharing to be unlawful, but that the record does not justify a prescription of unrestricted and unlimited sharing, there exists a reasonable solution to this situation in the form of existing tariffs (those of the SCC's), which were not considered by the Commission and have not in any legally permissible manner been found unlawful.

D. The Tariffs Under Which SIAC Is
Primarily Served Are Substantially
Different From Those of AT&T.

1. AT&T's Private Line Tariff
Provisions

In its decision in the proceeding under review, the Commission concluded that ". . . AT&T's tariffs with certain exceptions prohibit all intermediary activity, whether it be resale or an intermediary sharing arrangement." ¹⁸ The Commission reached this conclusion after examining the following AT&T tariff provision:

Private line service shall not be used for any purpose for which a payment or other compensation shall be received by . . . the customer . . . or in the collection, transmission, or delivery of any communications for others 19

The Commission noted:

Because these tariff provisions are couched in terms such as "payment" and "compensation" rather than "profit," they may be viewed as general prohibitions on all intermediary activity involving AT&T communications services and facilities with the exception of MTS. This, in effect, is how AT&T construes the above tariff provisions. 20

18 Report and Order, supra note 2, 60 F.C.C.2d at 277, J.A. at 49.

19 AT&T Tariff F.C.C. No. 260, Section 2.2.3.

20 Report and Order, supra note 2, 60 F.C.C.2d at 277, J.A. at 49 (emphasis in original).

Despite this general prohibition on intermediary activity, some types of sharing are nonetheless permitted by the joint and authorized use provisions under AT&T's private line tariff. As set forth in the tariff, however, both of these provisions offer only very limited types of sharing.

Under the joint use provisions, a customer may establish a joint use arrangement by designating persons, firms or corporations to be joint users of its private line service.²¹ Because the provisions allow sharing only of the customer's particular private line service, however, they generally benefit only entities having a need to communicate between the same two points.²² Furthermore, as the Commission noted, the administrative burdens imposed upon the customer in such a situation are so great that this type of sharing arrangement is often impractical.²³

On the other hand, authorized use arrangements permit communications to and from geographically separated entities. Under this provision, private line service may be used for:

. . . the transmission, to all stations simultaneously, of communications which

21 AT&T Tariff F.C.C. No. 260, Section 3.1.5.

22 Report and Order, supra note 2, 60 F.C.C.2d at 279, J.A. at 52-53.

23 Id., 60 F.C.C.2d at 275, J.A. at 46-47.

relate directly to matters of common interest to the customer and the authorized users when those connected to the service are all in the same general line of business. 24

This provision, however, also allows only a very limited form of sharing. Although under this provision it is feasible for the authorized users to be geographically separated, they may not directly communicate with each other or the public, because all communications must be "to or from the customer."²⁵ This requirement greatly circumscribes (indeed, it totally frustrates) any attempt to structure a truly efficient communications system of the type needed to serve the securities industry adequately.

Consequently, in light of the restriction imposed by the general prohibition on sharing activities and the very limited nature of sharing permissible under the joint and authorized use provisions, AT&T's restrictions against sharing, even among members of an industry having a "community of interest,"²⁶ are substantial.

24 AT&T Tariff F.C.C. No. 260, Section 2.2.1(B).

25 See Report and Order, supra note 2, 60 F.C.C. 2d at 279 n.57, J.A. at 26 n.57.

26 AT&T does permit certain industry intermediary sharing activity under its "single customer" tariff clauses, but this is not widespread. See generally, Report and Order, supra note 2, Appendix E, 260 F.C.C.2d at 330 et seq., J.A. at 127 et seq.

2. The Tariff Provisions of the Specialized
Common Carriers and Western Union

In contrast to AT&T's limited provisions for sharing through authorized use, the tariffs of the specialized common carriers (SCC's) and, to a degree, Western Union, typically include provisions allowing far greater flexibility for intermediary sharing of private line service. Indeed, these tariffs offer unlimited sharing to authorized users in the same business or industry. The provisions of Southern Pacific Communications Co. (SPCC) Tariff F.C.C. No. 2 are illustrative of these tariff provisions:

2. REGULATIONS

2.1 Definitions

. . .

Authorized User

The term "Authorized User" denotes a person, firm, or corporation, who is authorized by the subscriber to be connected to the service of the subscriber. In order to be an authorized user, the person, firm, or corporation designated must be either a subsidiary of the subscriber (more than 50% owned), or be engaged in the same business or industry. Banks, security dealers, and exchange brokers dealing in stocks, bonds or commodities shall be considered to be in the same business.

. . .

27 The tariff provisions of the other SCC's are similar, as are those of Western Union. See, e.g., Western Union Tariff F.C.C. No. 254, Section 2.2.1(C); MCI Telecommunications Corp. Tariff F.C.C. No. 1, Section C.6.012; Western Union Tariff F.C.C. No. 261, Section 3.2.1(C); United States Transmission Systems Tariff F.C.C. No. 1, Sections 2 ("Authorized User") and 3.5; RCA American Communications, Inc. Tariff F.C.C. No. 1, Section 2.7 ("Authorized User").

2.6 Use of Service

Subscribers, and their authorized users, may use the service furnished by the carrier for any lawful purpose. Subscribers, and their authorized users, may not receive any payment or other compensation for use of the service, except when the subscriber is a duly authorized and regulated common carrier. This provision does not prohibit subscribers, and authorized users, to share the cost of the service on a non profit basis. Use and restoration of the service furnished by the carrier will be in accordance with Part 64, Subpart D of the Federal Communications Commission Rules.

The effect of the SPCC, Western Union and similar tariffs of the other SCC's is to permit general intermediary sharing by means of industry organizations in any industry. Any group of entities in the "same business or industry" may take advantage of the authorized use provisions in the SPCC, Western Union and other SCC tariffs. Under these tariffs, transmission of communications both among authorized users with a community of interest and between such authorized users and the public is permitted, rather than simply between a user and the customer, as in AT&T's tariff. In its Report and Order, the Commission recognized this difference between the AT&T provisions on the one hand and the Western Union and SCC provisions on the other, but made no comment or finding beyond simply noting the difference with regard to Western Union's provision.

Significantly, these tariff provisions of Western Union and the SCC's have coexisted with these carriers' bulk rates. AT&T, when compelled to offer unlimited shared use, withdrew its bulk rate Telpak service by tariff revisions filed March 23, 1977. Had the Commission prescribed tariffs similar to those of Western Union and the SCC's, elimination of the benefits of bulk rates by AT&T would not have been necessary.

ARGUMENT

- I. The Commission Did Not Err in Holding That Entities Providing Sharing Arrangements on a Not-For-Profit Basis Are Not Common Carriers.

In its consideration of the possible regulation of sharing arrangements in the proceeding under review, the Commission, interpreting the Communications Act, held that sharing on a not-for-profit basis is not common carriage, while entities offering sharing on a for-profit basis may²⁹ require regulation as common carriers. Several parties have contended this holding was erroneous. (See Telenet Communications Corp. Brief at 10-21; United System Service, Inc. Brief at 12-23.) On the contrary, however, the Commission's interpretation of its organic act has been well-settled and consistently applied on this point since Aeronautical Radio, Inc. v. American Telephone & Telegraph Co., 4 F.C.C. 155 (1937).

²⁹ Report and Order, supra note 2, 60 F.C.C.2d at 316-17, J.A. at 102-04.

The Commission summarized its policy and alluded to its long-standing nature in Cooperative Sharing of Operational Fixed Stations, 4 F.C.C.2d 406, 417 (1966): "We have long made the distinction between persons engaged in providing service as common carriers and those rendering service on a nonprofit, cooperative basis" (emphasis added).

A more recent and explicit illustration of this policy was provided in 1971, when both Scantlin Electronics, Inc. (now Quotron Systems, Inc.) and Timeplex, Inc., sought advice concerning their possible common carrier status in furnishing multiplexing equipment in connection with line sharing. The only significant distinction between the proposals was that Timeplex had structured its arrangement in a fashion which envisioned a profit to it, while Scantlin had not. Timeplex was advised that it would be treated as a common carrier, while Scantlin was informed that it would not be so treated.

Particularly where its policy is as well-established as that of the Commission that nonprofit sharing does not constitute carriage "for hire," the Commission's view of whether an entity is engaged in common carriage is entitled

30 Letters from Acting Chief, FCC Common Carrier Bureau, to Scantlin Electronics, Inc. and Timeplex, Inc., Feb. 5, 1971.

For similar earlier examples, see Letter to Florists' Telegraph Delivery Ass'n, FCC Public Notice No. 1630, Dec. 6, 1951; Letter from Wayne Coy, Chairman of the FCC, to Counsel for the Chicago Board of Trade, Jan. 11, 1950.

to great deference. In the particular context of the interpretation of "common carrier," the Court of Appeals for the District of Columbia has stated:

In approaching the problem of statutory interpretation before us, we show "great deference to the interpretation given the statute by the officers or agency charged with its administration. 'To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.'"

Philadelphia Television Broadcasting Co. v. FCC, 359 F.2d 282, 283-84 (D.C. Cir. 1966) (footnote omitted).

Moreover, cases relied upon by the parties contending that the profit-nonprofit distinction is unlawful do not support their argument. For example, the case most frequently cited appears to be National Ass'n of Regulatory Utility Commissioners v. FCC, 525 F.2d 630 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976). Yet it is clear that the only reason that attributes of common carrier status other than profit were emphasized in the NARUC case is that the profit factor was assumed as a preliminary matter:

To create this quasi-public character [which appears to be the critical point in justifying regulation], it is not enough that a carrier offer his services for a profit, since this would bring within the definition private contract carriers which the courts have emphatically excluded from it. What appears to be essential to the quasi-public character implicit in the common carrier

concept is that the carrier "undertakes to carry for all people indifferently"

525 F.2d at 641 (footnotes omitted, emphasis added).

Finally, the Commission has retained jurisdiction to regulate arrangements which are nominally shared use, but otherwise demand regulation. Thus, there is no basis today to impose regulatory restraint on bona fide sharing arrangements.

II. Granting That Its Holdings Regarding AT&T's Existing Tariff Provisions Were Correct and Lawful, the Commission Could Have Prescribed Tariff Provisions Similar to Those of the Specialized Common Carriers and Western Union, But Instead 1) The Commission Did Not Consider All of the Relevant Factors Regarding These Tariffs, 2) The Commission Did Not Explain Adequately and Articulate Clearly the Grounds of Its Decision Not To Prescribe Similar Tariffs, and 3) The Commission Concluded That These Tariffs Were Unlawful, Despite the Fact That Such a Conclusion Was Not Supported by Substantial Evidence in the Record.

A. Introduction: Although the Commission Correctly and Lawfully Found AT&T's Tariff Provisions To Be Unlawful, It Could Have Remedied Such Unlawful Provisions by Prescribing Provisions Similar to Those of the Specialized Common Carriers and Western Union.

Contrary to AT&T's assertions in its brief in the case at bar (see AT&T Brief at 52-60), there was substantial evidence in the record and a rational basis for the Commission's conclusion that AT&T's restrictions and limitations on sharing are unjust and unreasonable and unlawfully discriminatory. However, rather than prohibiting all restrictions

on sharing, the Commission could have remedied the unlawful aspects of the AT&T tariff by prescribing provisions similar to those of the SCC's and Western Union, the justness and reasonableness and non-discriminatory nature of which were supported by the record.

The Commission was consequently required ". . . to make a reasoned choice of alternatives within a class of permissible actions." Pillai v. CAB, 485 F.2d 1018, 1030 (D.C. Cir. 1973). Instead, the Commission did not adequately consider the SCC and Western Union tariff provisions, did not acknowledge the significance of the differences between these provisions and those of AT&T, and summarily struck down the SCC and Western Union provisions along with those of AT&T.

B. The Commission Did Not Consider All Relevant Factors Regarding the Specialized Common Carrier and Western Union Tariffs.

Despite the fact that its inquiry concerned the resale and shared use policies and services of all common carriers and despite the fact that its Order invalidated the policies and services of all common carriers, the Commission's decision in the proceeding under review reflects a single-minded concern with AT&T and its private line policies and services. This concern was no doubt warranted by the restrictive nature of the AT&T provisions. However one result of this limited focus is that the Commission did not consider adequately all of the relevant factors regarding the SCC and Western Union tariffs.

1. The Commission Focused on
the AT&T Provisions.

The Commission's single-minded concern with the AT&T tariff provisions is evident even from the summary of its opinion:

Before determining the lawfulness of the tariffs, we find it helpful to look at the specific tariff provisions in issue. Although many carriers have restrictions on resale and sharing in their tariffs, we will refer to those of AT&T for our analysis. 31

The Commission then went on to summarize AT&T's tariff provisions. Without ever mentioning any tariffs other than those of AT&T, the Commission stated that:

We have examined the foregoing tariff provisions in light of the standards set forth in Sections 201(b) and 202(a) of the Act, and legal interpretations thereof, and find that existing restrictions on the sharing and resale of private line service are unjust and unreasonable and unlawfully discriminatory. 32

Because the Commission deemed it "crucial" to state simply what the decision "does and does not do," the Commission declared:

AT&T presently allows entities to resell and share its facilities and services. This has been done voluntarily by AT&T since at least the 1920's AT&T voluntarily allows certain groups to purchase

31 Report and Order, supra note 2, 60 F.C.C.2d at 264, J.A. at 31.

32 Id.

communications services and share the services among their members. Thus, AT&T has itself decided who should receive such status and who should not. What our decision does is simply to require AT&T to treat all of its customers alike unless valid reasons exist to the contrary. Such a requirement is mandated by the Communications Act. 33

The main body of the Commission's opinion indicates that the "Summary of Decision" section's single-minded focus on AT&T accurately reflects the approach of the decision as a whole. Despite the fact that it recognized in passing that "there is some variation in the degree to which individual carriers restrict resale and sharing of their communications services and facilities," the Commission nevertheless specifically stated that "subsequent discussion will primarily focus on AT&T's tariff restrictions." ³⁴ Furthermore, despite these acknowledged variations and its focus on AT&T's provisions, the Commission nevertheless stated that it ". . . will reach conclusions of law applicable to tariff restrictions imposed by all underlying ³⁵ carriers."

The Commission justified this approach by stating that, as the principal supplier of communications services and facilities, AT&T's tariff language is "often" adopted by other underlying carriers and that "[f]or this reason, we

33 Id., 60 F.C.C.2d at 266, J.A. at 34.

34 Id., 60 F.C.C.2d at 276, J.A. at 48.

35 Id. (emphasis added).

believe that reference to AT&T's tariffs will prove adequate for an analysis of the lawfulness of all carrier tariffs restricting resale and sharing.³⁶ In SIAC's experience, however, the Commission's premise has not been the case. For example, the SCC's have modeled their definitions of "authorized user" after that in Western Union's tariff.³⁷

2. The Commission Did Not Consider the Specialized Common Carrier and Western Union Tariffs and the Significant Differences Between These Tariffs and AT&T's Tariff

After an extensive exposition and discussion of AT&T's tariff provisions and policies, the Commission dealt with the resale and shared use restrictions of all other carriers in four paragraphs: two devoted to Western Union, one devoted to the SCC's and domestic satellite carriers³⁸ and one devoted to the international record carriers. Furthermore, much of this discussion was devoted to issues other than the actual tariff provisions.

Regarding the tariff provisions of the SCC's and the domestic satellite carriers, the Commission neither

36 Id. (emphasis added).

37 Compare Western Union Tariff F.C.C. No. 254, Section 2.5 ("Authorized User"-11th rev'd p. 29) with A&T Tariff F.C.C. No. 260, Section 2.5 ("Authorized User"-28th rev'd p. 25).

38 Report and Order, supra note 2, 60 F.C.C.2d at 296-98, J.A. at 74-77.

set forth their restrictions on sharing and resale nor indicated in any way how these restrictions differed from those of AT&T. Rather, the Commission cryptically noted that, in light of its decision finding AT&T's restrictions unlawful, ". . . no reason exists to treat other carriers in any different manner. Accordingly, we find unlawful such tariff restrictions which are inconsistent with our decision herein." ³⁹

With regard to Western Union's tariff provisions, the Commission simply declared that Western Union's "tariff restrictions on resale and sharing of private line service basically parallel AT&T's restrictions."⁴⁰ On the crucial issue of the terms of the authorized use provisions, the Commission stated only that.

Western Union's authorized use provisions are less restrictive than AT&T's provisions: authorized users need not be in the same line of business as the customer, but, if they are in the same line of business, transmission of communications between authorized users is allowed. ⁴¹

39 Id., 60 F.C.C.2d at 297, J.A. at 76.

40 Id., 60 F.C.C.2d at 296, J.A. at 74.

41 Id. (emphasis in original, footnotes omitted).

Despite the fact that it issued an Order declaring portions of the tariff provisions unlawful, this was the extent of the Commission's consideration of the tariffs of Western Union and the SCC's.

In light of this scant attention which the Commission granted the provisions of the non-AT&T tariffs, it is not surprising that it apparently failed to recognize the significance of the distinctions between the AT&T provisions regarding authorized use and those of the SCC's and Western Union.

The Commission did note that, under the terms of the Western Union authorized use provisions, transmission of communications between authorized users is permissible.⁴² However, it made no further comment on this aspect of the tariff, despite the great contrast which the provision offers to AT&T's provision limiting communications of authorized users to those to and from the customer.⁴³ Moreover, the Commission did not acknowledge that the SCC authorized use provisions offer somewhat greater sharing flexibility than even

42 Id.

43 See Report and Order, supra note 2, 60 F.C.C.2d at 279, 296, J.A. at 52-53, 74.

those of Western Union, allowing not only transmissions among authorized users which are members of a community of interest, but also between authorized users and the public.⁴⁴

In operation, the authorized use provisions of AT&T and those of the SCC's and Western Union are as different as night and day. AT&T's provision allows various entities to communicate only to and from a central location. Authorized users are prevented from communicating with each other. The AT&T "single customer" provisions, which allow intercommunication, are limited by their terms to only a few specific types of entities.

The SCC and Western Union provisions, on the other hand, allow the authorized users to intercommunicate, thus allowing the true realization of a sophisticated and efficient communications system capable of serving an industry such as the securities industry. Under these tariff provisions, each authorized user is placed in a position comparable to that of the customer in the AT&T authorized use provisions, with the ability to communicate with each of the other authorized users. As noted above, the SCC pro-

44 See, e.g., the SPCC provisions set out in the text, supra, at 15-16.

visions place each authorized user in the even more beneficial position of being able to communicate with the public at large using the private line service.

Using the community-of-interest sharing available through the authorized use provisions of the SCC and Western Union tariffs, the securities industry is currently provided with a useful and efficient range of communications services.

C. The Commission Did Not Identify the Crucial Facts and Did Not Explain Clearly Its Decision Regarding the Specialized Common Carrier and Western Union Tariffs.

As set forth in the preceding section, the Commission in the decision under review gave only fleeting consideration to the provisions regarding shared use in the tariffs of the SCC's and Western Union. Accordingly, the Commission was not in a position to explain clearly and adequately its decision regarding these tariffs and, in fact, it did not do so.

With regard to Western Union, the Commission simply stated that its tariff provisions "basically parallel" AT&T's restrictions.⁴⁵ The Commission went on to note that

45 Report and Order, supra note 2, 60 F.C.C.2d at 296, J.A. at 74.

Western Union's authorized use provisions differ from those of AT&T, but did not elaborate at all on the significance of this difference.⁴⁶ Despite this minimal consideration, the Commission summarily declared that:

For the reasons set forth in our discussion of the lawfulness of the AT&T tariff restrictions . . . , we find the Western Union restrictions on sharing and resale of private line service to be unjust and unreasonable and unlawfully discriminatory.⁴⁷

With regard to the tariff provisions of the SCC's, despite the substantial differences between the SCC and AT&T authorized use provisions, the Commission's consideration is set forth in full in the following:

With respect to the specialized common carriers and the domestic satellite carriers, we will not set forth their restrictions on sharing and resale. In view of our decision that the AT&T tariff restrictions are unlawful, except as to the monopoly MTS and WATS offerings, we conclude that no reason exists to treat other carriers in any different manner. Accordingly, we find unlawful such tariff restrictions which are inconsistent with our decision herein.⁴⁸

46 Id., 60 F.C.C.2d at 296, J.A. at 74-75.

47 Id., 60 F.C.C.2d at 297, J.A. at 75.

48 Id., 60 F.C.C.2d at 297, J.A. at 76.

To the extent that these passages contain any "findings" at all, in any meaningful sense of the term, these "findings" are merely unexplained and illogical conclusions. In any case, the Commission's action in this proceeding regarding the tariffs of the SCC's and Western Union is not in accord with judicial requirements that "the agency articulate with reasonable clarity its reasons for decision, and identify the significance of the crucial facts"

Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971). See also WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969).

It is necessary that "agencies present sufficient support for their conclusions in order that the court can properly review their decision." Hawaiian Telephone Co. v. FCC, 498 F.2d 771, 777 (D.C. Cir. 1974) (footnote omitted). Indeed, it is the most basic of all administrative requirements that "the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained." SEC v. Chenery Corp., 318 U.S. 80, 94 (1943).

In light of the fact that it did not even submit the authorized use provisions of the SCC's and Western Union to meaningful analysis, the Commission can hardly be said to have identified the significance of crucial facts. Further-

more, the summary and conclusory fashion in which the Commission dealt with the SCC and Western Union provisions certainly does not provide a reasonably clear articulation of the reasons for its decision regarding them.

- D. The Commission's Conclusion That, Rather Than Prescribing Similar Provisions, the Specialized Common Carrier and Western Union Tariff Provisions Are Unjust and Unreasonable and Unlawfully Discriminatory Is Not Supported by Substantial Evidence or a Rational Basis in the Record.

In the decision under review, rather than prescribing nondiscriminatory sharing provisions similar to those of the SCC's and Western Union, the Commission instead declared that the private line sharing provisions of the SCC's and Western Union were unjust and unreasonable and unlawfully discriminatory. These conclusions were necessary under the pertinent provisions of the Communications Act (47 U.S.C. §§ 201(b), 202(a) and 205) before the Commission could strike down the existing tariff provisions. In the case of the SCC's, the conclusions were not even explicitly stated.⁴⁹

49 Report and Order, supra note 2, 60 F.C.C.2d at 297, J.A. at 75-76.

Even when the conclusions were explicitly stated with regard to Western Union, however, they were not accompanied by any supporting analysis.⁵⁰ These conclusions, as they apply to the tariff provisions of both the SCC's and Western Union, are not supported by substantial evidence in the record.

With regard to the conclusion that the SCC and Western Union provisions for private line sharing are unjust and unreasonable (see 47 U.S.C. § 201(b)), the Commission failed to point to any record evidence to support this conclusion. Since the SCC and Western Union provisions are markedly different from those of AT&T, the justness and reasonableness of the former provisions required analysis of numerous factual issues independent of the analysis of AT&T's provisions. The Commission did not furnish such an analysis, but instead simply stated, in effect, that having found AT&T's extremely restrictive provisions unlawful, no analysis of other carriers' lesser restrictions was necessary because the Commission would prescribe that no

50 Id., 60 F.C.C.2d at 296, J.A. at 74-75.

carrier could impose any restrictions on sharing.⁵¹ This Court has previously recognized the illegality of such an approach. American Telephone & Telegraph Co. v. FCC, supra, 449 F.2d at 450-53.

It is not surprising, however, that the Commission chose not to analyze and document support for its conclusion regarding the justness and reasonableness of the SCC and Western Union sharing provisions, since it would have been hard pressed to find any support at all in the record for its conclusion. Since none of the private line users

51 In its discussions of the possible regulation of sharing arrangements (see Report and Order, supra note 2, 60 F.C.C.2d at 319-20, J.A. at 106-07) and of the "single customer" provisions (see Report and Order, 60 F.C.C.2d at 335-36, J.A. at 139), the Commission noted the possibility of restricting the availability of unlimited sharing to groups of entities in the "same line of business." The Commission rejected this approach, but the only reason it advanced for this action is clearly erroneous. The Commission declared that "[o]ne adverse effect [of a "same line of business" limitation] would be the hindrance of communications between groups with different affinities." 60 F.C.C.2d at 336, J.A. at 139. But this obviously presumes a limited type of sharing, such as AT&T's authorized use provisions, in which the authorized users cannot communicate with the public. Clearly, the Commission's statement is totally inapplicable to community-of-interest sharing provisions in which the authorized users may communicate with the public as well as with each other, as in the SPCC provision set out in the text at 15-16.

in the proceeding advocated unrestricted and unlimited sharing, the SPCC provision, for example, allowing unlimited sharing to any group of entities in the same business or industry, was hardly the subject of criticism by the parties.

Thus, there is no factual basis in the record for the conclusion that the liberal sharing provisions of the SCC's and Western Union are unjust and unreasonable. On the contrary, SIAC provided the Commission with evidence that these tariff provisions are greatly beneficial to private line users.⁵² In any case, in light of the significant differences between the different provisions, there is no basis for summarily extending the conclusion that the AT&T provisions are unjust and unreasonable to the SCC and Western Union provisions.

There is likewise no basis in the record for the conclusion that the SCC and Western Union sharing provisions are unlawfully discriminatory (see 47 U.S.C. § 202(a)). Again, the question of what constitutes "unjust or unreasonable," and therefore unlawful, discrimination requires analysis of numerous subsidiary factual questions. The Commission provided no such analysis, attempting instead to transfer the

52 See generally SIAC Comments, J.A. at 702 et seq.; SIAC Reply Comments, J.A. at 1251 et seq.; SIAC Response Comments, J.A. at 1274 et seq.

conclusion regarding the AT&T provisions to those of the SCC's and Western Union. This is clearly inappropriate when the provisions of the respective carriers vary as significantly as they do in this case.

The Commission's failure to provide any analysis is understandable, because to do so would have been exceedingly difficult. In contrast to AT&T's "single customer" provisions, the only AT&T provisions which approach the tariffs of the SCC's and Western Union in terms of commercial usefulness and efficiency for specific industries, service under the SCC and Western Union authorized use provisions is available to any and all groups in the same line of business or the same industry which seek to utilize such services. In other words, the tariffs are prima facie non-discriminatory; the Commission has neither presented reasoning nor indicated record evidence to demonstrate that the tariffs have an unlawfully discriminatory impact.

CONCLUSION

Therefore, this Court should affirm the Commission's decision to continue its past policies that nonprofit shared use of communications should not be subject to detailed economic regulation under Title II of the Communications Act.

Such commendable regulatory forbearance is well-grounded in the Communications Act and should be encouraged. Nonetheless, in the event that the Commission's Order in the proceeding under review is vacated and the cause remanded for other defects, the Commission should be directed to prescribe private line sharing provisions similar to those currently provided by the SCC's and Western Union.

In considering sharing provisions which are just and reasonable, the Commission is obligated to make "... a considered evaluation of the presently available alternatives." Pillai v. CAB, supra, 485 F.2d at 1029. In light of the unrealistic economic nature of totally unrestricted and unlimited sharing,⁵³ SIAC believes that the provisions of the SCC's and Western Union permitting unlimited sharing to entities within the same line of business or the same industry are just and reasonable. In other words, once it is determined that some restriction on the availability of sharing is appropriate in order to preserve the benefit of bulk rates, and in the absence of Title II regulation ensuring conformity with the not-for-profit limitation on sharing, confining the sharing within an industry or among entities in the same line of

53 See American Telephone & Telegraph Co. v. FCC, supra, 449 F.2d at 451-53.

business is a just and reasonable limitation which is non-discriminatory. This community of-interest approach to sharing is particularly appropriate in light of the Commission's reluctance to regulate sharing, because community-of-interest sharing facilitates self-policing of the not-for-profit limitation. The sharing entity cannot offer sharing outside of the community and, within the community, the member-sharers will require that all savings are passed-through.

On the question of whether it is just and reasonable to restrict the availability of unlimited sharing to entities within the same industry or line of business and intermediaries serving them, it is instructive to note that the primary record basis for the Commission's conclusion that sharing and resale would be in the public interest was drawn from the activities of two organizations which have limited their intermediary activities to serving their respective industries, namely Aeronautical Radio, Inc., which serves the airline industry, and SIAC, which serves the securities industry.⁵⁴

54 Reconsideration Order, supra note 2, ¶ 13, J.A. at 161 ("The sharing arrangements as described in the record in this proceeding are, in our view, convincing evidence that such communications operations serve an important public function and should be encouraged if we are to carry out our mandate under the Communications Act. See, e.g., ARINC Comments at 4-50; SIAC Comments at 3-35.")

From record materials such as these which clearly documented the justness and reasonableness of a "community of interest" approach to sharing, the Commission then extrapolated, without record support, to unrestricted and unlimited sharing. It is our contention that the Commission adopted this policy to prompt AT&T to withdraw its Telpak offering, which the Commission's staff has viewed with disfavor for quite some time. Thus, the Commission's prescription of unrestricted and unlimited sharing may have resulted in AT&T's withdrawing Telpak and at least one SCC following suit, sheltered by the pricing "umbrella" of AT&T's recently-filed rate structure. Thus, the user community may well be faced with the ironic situation of the Commission endorsing unrestricted and unlimited sharing and the communications companies simultaneously withdrawing those services which are most useful to the sharer.

Respectfully submitted,

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